

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

DWAYNE ADAMS, ET AL.

PLAINTIFFS

VS.

CIVIL ACTION NO. 3:10CV475TSL-MTP

COLUMBUS LUMBER COMPANY, LLC,
ET AL.

PLAINTIFF

MEMORANDUM OPINION AND ORDER

This cause is before the court on the motion of defendants Brookhaven Sawmill Company, Douglas Boykin and H. Ross Arnold to dismiss. Plaintiffs have not responded to the motion, and the time for filing a response has now passed. The court, having considered defendants' memorandum of authorities, concludes the motion is well taken and should be granted.

Plaintiffs filed this class action alleging that defendant Columbus Lumber Company, LLC failed to provide employees sixty days' notice before closure of its plant in Brookhaven, as required by the Worker Adjustment and Retraining Notification Act (WARN Act), 29 U.S.C. §§2101 *et seq.* Movant Brookhaven Sawmill Company is the parent company of Columbus Lumber Company; Ross Arnold is a majority owner of both companies; and Douglas Boykin is a shareholder of Brookhaven Sawmill Company and an officer and director of Columbus Lumber Company.

Brookhaven Sawmill Company and Boykin seek dismissal pursuant to Federal Rule of Civil Procedure 12(b)(5) for failure to timely effect service of process. Rule 4(m) of the Federal Rules of

Civil Procedure, which governs the timeliness of service of process, states:

(m) Time Limit for Service. If a defendant is not served within 120 days after the complaint is filed, the court-on motion or on its own after notice to the plaintiff-must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).

Thus,

Under Rule 4(m), a district court is permitted to dismiss a case without prejudice if a defendant has not been served within 120 days after a complaint is filed. Thompson v. Brown, 91 F.3d 20, 21 (5th Cir. 1996). However, if a plaintiff can establish good cause for failing to serve a defendant, the court must allow additional time for service. Id. Moreover, even if good cause is lacking, the court has discretionary power to extend time for service. Id. Such relief may be warranted, "for example, if the applicable statute of limitations would bar the refiled action, or if the defendant is evading service or conceals a defect in attempted service." Fed.R.Civ.P. 4(m) advisory committee's note (1993).

Newby v. Enron Corp., No. 06-20658, 2008 WL 2605118, at *2 (5th Cir. July 2, 2008).

As plaintiffs' complaint was filed in this cause August 27, 2010, plaintiffs had until December 27, 2010 to serve process. According to defendants, plaintiffs did not attempt to serve Brookhaven Sawmill Company or Boykin until 95 days after this date, on March 30, 2011. Plaintiffs have not undertaken to demonstrate good cause for their failure to timely serve process,

or for that matter offered any explanation why process was not timely served, and they have never sought an extension of time for service. These defendants' motion to dismiss will therefore be granted.

Defendant Arnold seeks dismissal of plaintiffs' complaint on the basis that he was not properly served with process in accordance with Rule 4(e) since, as attested in Arnold's affidavit, the individual to whom plaintiffs' process server delivered the complaint and summons was not Arnold's authorized agent for service of process and was not in any other way authorized to accept service of process on behalf of Arnold. See Fed. R. Civ. Proc. 4(e) (stating, inter alia, that "an individual ... may be served ... by: (1) following state law for serving a summons ...; or (2) doing any of the following (A) delivering a copy of the summons and of the complaint to the individual personally; (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or (C) delivering a copy of each to an agent authorized by appointment or by law to receive such process."); see also Illinois Central Gulf R.R. Co. v. Hampton, 117 F.R.D. 588, 591 (S.D. Miss. 1987) ("The agency status by which one is authorized to receive process for another may be express or implied. However, the agency relationship, if one exists, must be for the specific purpose of receiving service of

process." (citing 4A Wright & Miller, Federal Practice and Procedure; Civil 2d § 1097 (1987)).

As defendants note, upon finding that service is insufficient but curable, a court "generally should quash the service and give the plaintiff an opportunity to re-serve the defendant.'" See Rhodes v. J.P. Sauer & Sohn, Inc., 98 F. Supp. 2d 746, 750 (W.D. La. 2000) (citation omitted); however, dismissal without opportunity to cure is appropriate where proper service would be futile. See id. 5A Charles A. Wright & Arthur R. Miller, § 1354. Here, defendants submit that since the 120-day time period for service of process has already passed, the opportunity to cure plaintiffs' ineffective has passed. Plaintiffs offer no argument to the contrary, and therefore, their complaint against Arnold will be dismissed pursuant to Rule 12(b)(5).

For the foregoing reasons,¹ it is ordered that the motion of Brookhaven Sawmill Company, Arnold Ross and Douglas Boykin is granted.

SO ORDERED this 19th day of May, 2011.

/s/Tom S. Lee

UNITED STATES DISTRICT JUDGE

¹ Because the court concludes that the complaint against the movants is due to be dismissed on service of process grounds the court need not address these defendants' alternative arguments seeking dismissal pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted, though it does appear that defendants' argument in support of this part of their motion has merit, and plaintiffs have not responded contending otherwise.